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No.

In The
Supreme Court of the United States
October Term, 1987

NORTHERN GROUP SERVICES, INC., *et al.*,
Petitioners,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO., *et al.*,
Respondents.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

David J. Lanctot
(Counsel of Record)
BRANDT, HANLON, BECKER, LANCTOT,
McCUTCHEON, MARTIN & SCHOOLMASTER
1700 First Federal Building
Detroit, Michigan 48226
(313) 237-5648
Attorneys for Respondent
Auto Club Insurance Association

RENAISSANCE PRINTING, INC., 1133 GRISWOLD
DETROIT, MICHIGAN 48226 (313) 964-3185

QUESTIONS PRESENTED

I.

Is a coordination of benefits provision in a self-insured ERISA Plan entitled to supremacy over a conflicting coordination of benefits provision in a no-fault automobile insurance contract?

II.

Does the Deemer Clause prevent application of State Insurance Laws to an ERISA Plan which purchases stop-loss insurance?

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OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Respondent prays that this Court deny the petition for a writ of certiorari to review a judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered on November 13, 1987.

STATEMENT OF THE CASE

Petitioners Masco Industries, Inc. Employees' Benefit Plan for Hourly Employees of Forming Technology, Masco Industries, Inc. Employees' Benefit Plan for Salaried Employees, Masco Industries, Inc. Self-Funded Employee Benefit Plans (Masco Plans) and Highland Appliance Company's Medical Benefit Plan (Highland Plan) are employer funded health benefit plans formed under the Employee Retirement Income Security Act of 1974 (ERISA). 29 U.S.C. 1001 *et seq.* Northern Group Services and Highland Appliance Company are Michigan corporations. Masco Industries, Inc. is not a Michigan corporation but is qualified to do business in Michigan. There are approximately 5,000 employees in the Masco Plans with participants in all 50 states and approximately 2,000 employees in the Highland Plan with participants in at least 4 states. All of the Plans are administered by Northern Group Services, a third-party administrator. In addition to the Masco Plans and the Highland Plan, Northern Group Services administers approximately 50 other ERISA Plans. Of these 50 Plans, approximately 90 percent purchase stop-loss insurance. Mr. William D. Alcott, III, the President of Northern Group Services, estimates that, nationally, 90 percent of ERISA Plans have some kind of insurance. The Highland Plan is an example of an ERISA Plan which purchases stop-loss insurance. The Masco Plans, however, are self-insured, there being no insurance coverage at all with respect to these Plans. Both the Masco Plans and the Highland Plan have a coordination of benefits provision which the Plans claim makes the coverage of the Plans excess over any no-fault auto insurance coverage.

The Auto Club Insurance Association, a Michigan no-fault insurance carrier, offers to its insureds coordinated benefits coverage at a reduced premium in accordance with the requirements of M.C.L.A. 500.3109a which provides as follows:

> "An insurer, providing personal protection benefits shall offer, at appropriately reduced premium rates, deductibles and exclusions reasonably related to other health

and accident coverage on the insured. The deductibles and exclusions required to be offered by this section shall be subject to prior approval by the Commissioner and shall apply only to the benefits payable to the person named in the policy, the spouse of the insured, and any relative of either domiciled in the same household."

When an insured elects to buy coordinated medical benefits coverage, he pays a reduced premium. In consideration of the reduction of premium, the Auto Club Insurance Association is allowed by M.C.L.A. 500.3109a to insert a coordination of benefits provision in the insurance contract. The coordination of benefits provision in the Auto Club Insurance Association's contract makes other health insurance or health coverage primary. All of the coordination of benefits provisions in the Masco Plans, the Highland Plan and the Auto Club Insurance Association policy are known as "excess" provisions.

When an eligible member of either the Masco Plans or the Highland Plan is injured in an automobile accident and the eligible employee has automobile insurance containing a coordinated medical benefits provision with the Auto Club Insurance Association, a dispute arises as to which coverage affords primary medical benefits because of the conflict between the "excess" provisions in the Masco Plans and the Highland Plan with the "excess" provision in the Auto Club Insurance Association policy. It must be remembered that the conflict arises only when the employee purchases no-fault insurance with a coordinated benefits provision. If the employee purchases a full coverage no-fault insurance policy, i.e. one that does not contain a coordination of benefits provision, then there is no conflict between the no-fault insurance contract and the ERISA Plan and the no-fault carrier would pay primary benefits.

The ultimate problem existing between the Masco Plans and the Highland Plan and no-fault insurers in Michigan is how the conflict between the coordination of benefits provisions in the Plans and insurance contract should be resolved.

The development of this conflict should be put in historical prespective.

The Michigan Supreme Court grappled with the constitutionality of Michigan's No-Fault Law in *Shavers* v *Attorney General*, 402 Mich 554, 267 NW2d 72 (1978). Because of the compulsory nature of Michigan's no-fault insurance, the Michigan Supreme Court examined the due process requirements of both the State and Federal Constitutions and concluded that the constitutionality of the Michigan No-Fault Statute was inexorably dependent on whether no-fault insurance was available at fair and equitable rates. *Shavers* at p. 599.

In 1974 Michigan enacted M.C.L.A. 500.3109a in a further attempt to reduce no-fault automobile insurance premiums.

A few years ago, the health coverage industry in Michigan, en masse, began adding provisions in health care plans and policies indicating that the coverage provided by the plan or policy was excess coverage if the person had no-fault automobile insurance. Obviously, this was an attempt on the part of the health coverage industry to shift the costs for medical expenses arising out of automobile accidents to the no-fault automobile insurance industry. When a particular person had a coordinated medical benefits provision in his or her no-fault automobile insurance policy and the person also had a health coverage plan or policy which also had a coordinated benefits provision, a conflict arose as to which of the two coverages would be primary.

Also, within the last few years the law in Michigan relating to conflicting "coordination of benefit" clauses came under scrutiny by the Michigan Appellate Courts. In *Farm Bureau Insurance* v *H. Mann Insurance*, 131 Mich App 98, 345 NW2d 655 (1983) (escape clause vs pro-rata clause) and in *Mary Free Bed Hospital* v *INA*, 131 Mich App 105, 345 NW2d 658 (1983) (escape clause vs excess clause), the Michigan Court of Appeals adopted the Lamb-Weston rule

regarding resolution of conflicting "coordination of benefit" clauses. If a conflict exists between the two clauses in the policies, i.e. each clause claiming the other is primary in coverage, and if each policy would provide coverage for the loss if the other policy did not exist, the Lamb-Weston rule states that both clauses should be disregarded and declared to be mutually repugnant and the coverage of both policies is shared on a pro-rata basis. These two cases just mentioned dealt with *non no-fault* insurance policies. One year later, the Court of Appeals applied the Lamb-Weston rule, for the first time, to a conflict between a health insurance carrier and a no-fault insurance carrier. See *Federal Kemper* v *Health Insurance*, 135 Mich App 76; 351 NW2d 900 (1984), modified 424 Mich 537, 383 NW2d 590 (1986). While the *Kemper* decision was being appealed to the Michigan Supreme Court, many, if not all, health insurance carriers and no-fault insurance carriers began to share losses on a pro-rata basis consistent with the then existing Michigan Law.

Then in 1985, the Michigan Court of Appeals decided *Auto Club* v *Frederick & Herrud*, 145 Mich App 722, 377 NW2d 902 (1985). The Court examined the legislative intent surrounding the enactment of M.C.L.A. 500.3109a and concluded that the purpose of the statute was to prevent duplication of benefits and to keep auto insurance premiums and health care costs to a minimum. To further the intent of the Legislature, the *Frederick & Herrud* Court, on public policy grounds, held that the health insurance carrier owed primary benefits and the no-fault insurance carrier owed only secondary benefits. Finally, the *Frederick & Herrud* analysis was approved and adopted by the Michigan Supreme Court in 1986. See *Kemper, supra*.

However, following the *Frederick & Herrud* decision, no-fault insurance carriers began demanding 100 percent reimbursement from health coverage providers. The usual practice was for the no-fault insurance carrier to pay the entire amount of the medical benefits and then seek reimbursement from the other health coverage provider. The problem caused by

the *Frederick & Herrud* case prompted Northern Group Services, Inc. to file this instant litigation, according to its President, Mr. William D. Alcott, III.

Northern Group Services, Inc., the Masco Plans and the Highland Plan filed an action in the Federal District Court asking the Court to declare that M.C.L.A. 500.3109a, and the Court decisions interpreting that statute, was pre-empted by ERISA, 29 U.S.C. Sec. 1144. This statute has three parts: pre-emption clause, savings clause, and deemer clause.

> "Except as provided in sub-section (b) of this section, the provisions of this sub-chapter and sub-chapter III of this chapter shall supercede any and all State Laws insofar as they may now or hereafter relate to any employee benefit plan. . . ." 29 U.S.C. Sec. 1144(a)

> "Except as provided in sub-paragraph (B) nothing in the sub-chapter shall be construed to exempt or relieve any person from any law of any state which regulates insurance, banking or securities. . . ." 29 U.S.C. Sec. 1144(b)(2)(A)

> "Neither an employee benefit plan . . . nor any trust established under such plan, shall be deemed to be an insurance company or other insurer . . . or to be engaged in the business of insurance . . . for purposes of any law of any State purporting to regulate insurance companies, insurance contracts. . . ." 29 U.S.C. Sec. 1144(b)(2)(B)

While acknowledging the conflict in the coordination of benefits provisions between the Masco Plans, Highland Plan and the automobile no-fault insurance contracts, petitioners contended that ERISA made their coordination of benefits provision supreme over the one in the no-fault insurance contract. The Respondents answered by contending that the dispute was one of *contractual* interpretation and not ERISA pre-emption but even if ERISA pre-emption applied, the contract provisions would still exist and the conflict between them had to be resolved. The problem was what law should be used to resolve the conflict. Respondents contended that Michigan law should be used to resolve the conflict. Since

there is no Federal common law of contract, the Federal Court should look to state law and, the Respondents contended, even the public policy of the state should be considered. In this case, it seemed even more appropriate to apply Michigan law since both the Masco Plans and the Highland Plan chose Michigan law for interpretation of the Plan provisions. The Highland Plan has a provision stating the following:

> "The Plans shall be interpreted under the laws of Michigan." (J.A. 579)

The Masco Plans have a similar provision which states as follows:

> "To the extent not inconsistent with Federal Law, the Plan shall be interpreted under the laws of Michigan." (J.A. 650)

Repsondents contended that, under both Federal common law and the Plans choice of law provisions, Michigan law should be used to resolve the conflict in the coordination of benefits provisions.

Furthermore, as to the Highland Plan, Respondents contended that even if ERISA pre-emption applied, that M.C.L.A. 500.3109a was saved from pre-emption by the insurance saving section of the ERISA pre-emption statute and that the Highland Plan was subject to insurance law regulation because the Highland Plan had purchased stop-loss insurance.

The District Court granted summary judgment to petitioners taking the position that M.C.L.A. 500.3109a was pre-empted and that neither Plan was insured. The Court resolved the conflict in the coordination of benefits provisions by equating ERISA pre-emption with surpremacy and held that the no-fault automobile insurance coverage was primary to the coverage provided by the Masco Plans and the Highland Plan.

The Sixth Circuit Court of Appeals reversed that lower court's decision, holding that Michigan law as enunicated in

the *Federal Kemper* case controlled. Specifically, the Sixth Circuit found that pre-emption applied and that M.C.L.A. 500.3109a was saved from pre-emption by the insurance savings provisions of the ERISA pre-emption statute. The Court further determined that the Highland Plan was an insured Plan. As to the Masco Plans which were self-insured, the Court concluded that the deemer section of the ERISA Pre-emption Statute did not bar the application of Michigan law relating to coordination of benefits provisions.

REASONS FOR OPPOSITION TO GRANTING OF WRIT

I.

A COORDINATION OF BENEFITS PROVISION IN A SELF-INSURED ERISA PLAN IS NOT ENTITLED TO SUPREMACY OVER A CONFLICTING COORDINATION OF BENEFITS PROVISION IN A NO-FAULT INSURANCE CONTRACT AND THE SIXTH CIRCUIT REACHED THE FAIR AND CORRECT RESULT BASED ON THE OVERALL OBJECT OF ERISA AND THE PECULIAR FACTUAL CIRCUMSTANCES EXISTING IN THIS CASE.

Congress enacted ERISA to protect the *interest of participants* in employee benefit plans. 29 U.S.C. Sec. 1001(b). In fact, the fiduciary of an ERISA Plan is mandated to discharge his duties solely in the *interest of the participants* and beneficiaries. 29 U.S.C. Sec. 1104(1). So in looking at the issues in this case, it must be determined what is in the best interest of those residents of Michigan who are employees of Masco and Highland and participants in the employers' ERISA Plan remembering that only a portion of the 5,000 Masco employees and the 2,000 Highland employees who are members of the Plan are actually Michigan residents.

In resolving ERISA pre-emption issues, the Court should look to see if the overall purpose of ERISA would be served

by pre-emption. *Fort Halifax Packing, Co.* v *Coyne*, ____ U.S. ____, 107 S.Ct. 2211, 96 L.Ed.2d 1 (1987). Each section of the ERISA pre-emption statute, 29 U.S.C. Sec. 1144 (pre-emption clause, savings clause, deemer clause) must be given meaning considering the overall purpose of the object and policy underlining ERISA. Specifically, the savings clause should be interpreted not only with a common sense view and the case law under the McCarran-Ferguson Act, 15 U.S.C. Sec. 1011 *et seq.* but also the role of the saving clause in ERISA as a whole. See *Pilot Life Ins. Co.*v *Dedeaux*, ____ U.S. ____, 107 S.Ct. 1549, 95 L.Ed.2d 39, (1987).

The Sixth Circuit concluded that pre-emption applied since M.C.L.A. 500.3109a "related to" the Masco Plans and the Highland Plan. However, the Sixth Circuit also determined that M.C.L.A. 500.3109a was saved from pre-emption under the McCarran-Ferguson criteria enunciated in *Metropolitan Life Ins.* v *Mass.*, 471 U.S. 724, 105 S.Ct. 2380, 85 L.Ed.2d 728 (1985). With respect to the Masco plans which are self-insured, the Sixth Circuit then analyzed the deemer clause in light of the object of ERISA as a whole and balanced that object with the strong public policy of state regulation of insurance. The balancing of the competing interests by the Sixth Circuit was necessitated, in part, because there is no Federal law, statute or otherwise, which governs or relates to coordination of benefits provisions in ERISA Plans.

Because the Masco Plans are self-insured, does the deemer clause prohibit any Michigan law from affecting the Masco Plans? First of all one must ask why the word "purporting" is in the deemer clause but is not in the savings clause. It must be considered that Congress intended something specific by the use of the word "purporting." The Sixth Circuit opinion recognized that the use of the word "purporting" was designed to prevent the states from indirectly regulating an ERISA Plan by guise, pretext or some other devious legislation. Such is not the case here. M.C.L.A. 500.3109a was not enacted to specifically regulate the content of welfare benefits provided by ERISA. In fact, this fact distinguishes

this case from most other ERISA pre-emption cases which deal with mandated benefit statutes.

Petitioner argues that the Sixth Circuit opinion prevents a uniform application of the ERISA Plan. While uniformity was a goal in ERISA, this uniformity was still modified by the countervailing interests of continued state regulation of insurance. In other words, possible lack of uniformity in ERISA Plans was acknowledged and accepted. As the U.S. Supreme Court noted in *Metropolitan*, at p. 2393, some national ERISA Plans lack uniformity because of the problems encountered in entering local markets to purchase insurance but the Court further noted that "[s]uch disuniformities, however, are the inevitable result of congressional decision to 'save' local insurance regulation. Arguments as to the wisdom of this policy choice must be directed at Congress."

Implicit in the petitioner's argument is the suggestion that uniformity now exists in the Masco Plans. Yet, that is not true. While the Masco Plans are uniform in benefits provided, i.e. hospital and surgical benefits, the Plans have never been uniform in the *amounts* of benefits paid. M.C.L.A. 500.3109a does not affect the uniformity of benefits offered by the Plans but merely affects the amounts paid by the Masco Plans, which amounts have never been uniform anyway. Assume that three Masco employees are involved in automobile accidents, one living in Florida, one living in Illinois and one living in Michigan and all incurring medical expenses of $100,000. Since Florida has a $10,000 limitation in its no-fault insurance coverage, the Masco Plan would pay $90,000 of that employee's medical expenses. Since Illinois is not a no-fault state, the Masco Plan would pay $100,000 of the Illinois employee's expenses. However, since the Michigan employee has unlimited medical expense coverage under no-fault, the Masco Plan would pay nothing towards the $100,000 in medical expenses.

Masco argues that it wants only to look to the plan documents (except where it would be unfavorable to the Plans, i.e. following the choice of law provision) to determine how

the plan should be administered and, yet, it must look outside the plan anyway to determine the laws of the various states vis-a-vis no-fault insurance coverage and whether or not the employee, in fact was covered by the no-fault insurance contract.

Even though the amounts paid by the Masco Plans differ depending on the availability of no-fault insurance coverage to the employee, the Masco Plans do not rate or underwrite that fact. The cost per plan participant is the same whether or not the person has no-fault coverage or not. In effect, the Michigan participants in the Masco Plans are subsidizing the plan participants in the other 49 states. How is this in the best interest of the Michigan participants in the Masco Plans?

It is commonly understood that the employer pays for the employee's health benefit plan but the employee pays for his or her own automobile insurance coverage. This case is no exception. M.C.L.A. 500.3109a merely requires the no-fault insurance carrier to offer a choice to the insured to purchase full no-fault insurance coverage or to purchase coordinated benefits coverage for a reduced premium. It is the employee's choice. Yet, if the employee does not have other health coverage, he is not entitled to get coordinated benefits coverage and pay a reduced premium. The Masco Plans, by taking the position that their plan is excess over Michigan no-fault coverage, are requiring their employees to pay more money for automobile insurance and thereby, indirectly, supplementing the cost of the ERISA Plan without disclosure to the employee. So not only does the Michigan Masco Plan participant subsidize the Plan in the first place by having to buy no-fault insurance coverage, but the Masco Plans are requiring the Michigan participants to subsidize the Masco Plans even further by forcing the employee to buy full no-fault insurance coverage rather than coordinated benefits coverage and, thus, pay a higher premium for his or her automobile insurance coverage.

In lieu of participation, in the Masco Plans, Masco Corporation offers its employees the option of joining a health

maintenance organization. This option is required by the Federal Health Maintenance Organization Act, specifically 42 U.S.C. 300 e-9(a)(1)(B). Masco Corporation pays the cost of the health maintenance organization membership. HMOs are clearly within the purview of M.C.L.A. 500.3109a and the coverage of the HMO would be considered primary over Michigan no-fault coverage. See *Kemper, supra* and *U.S. Fid and Guar Co.* v *GHP*, 131 Mich App 268, 345 NW2d 683 (1983). The Masco Corporation employee with HMO coverage would be allowed to buy a no-fault insurance policy with a coordinated benefits provision and would get a reduced premium. However, according to the petitioners, an employee of the Masco Corporation who chooses the ERISA Health Plan would have to pay more for the automobile insurance by buying full coverage instead of coordinated benefits coverage. It doesn't make common sense to allow Michigan's Coordination of Benefits Law to affect the coverage of some employees of Masco Corporation (those with HMO coverage) and not affect the health coverage of other employees of Masco (those who chose the ERISA Plan).

The Masco Plans are really contracts providing certain health care benefits just as the no-fault automobile insurance policy is a contract providing certain benefits. The Masco Plans have a coordination of benefits provision which is in conflict with the coordination of benefits provision in the automobile insurance policy. These are really irreconcilable contractual provisions. The same type of conflict could exist completely apart from M.C.L.A. 500.3109a. In fact, a whole body of law has developed throughout the country relating to the resolution of conflicting coordination of benefits provisions. How would the petitioners resolve the conflict in coordination of benefits provisions with an insurance policy providing medical benefits coverage in a non-no-fault state, like Illinois, for example? Would the Masco Plans take the position that its provision is supreme over the insurance contracts provisions? Under what color of right could the Masco Plans claim to be supreme over an insurance contract

provision not mandated by any law? So what difference does it make that a Michigan coordination of benefits provision in a no-fault policy is mandated by law?

The Masco Plans contemplated that conflicts and questions would arise regarding interpretation of various plan provisions. Why else would a choice of laws provision be inserted in the plans? What would the Masco Plans do if the participant was also covered by another ERISA Plan. Masco Plans claim their provision is supreme and entitled to enforcement. But can't the same be said for the other ERISA Plan? This very problem was dealt with in *Northeast Dept. ILGWU* v *Teamsters Local U. No. 229*, 764 F.2d 147 (3d Cir., 1985). *Northeast* dealt with a dispute between two ERISA Plans over which coordination of benefits provision took precedence. One plan had an escape clause and the other had an excess clause. In order to resolve the conflict between these two clauses, the Court noted that the Federal common law would control. However, since there was no Federal common law relating to coordination of benefits clauses, the Court had to look to state law for guidance. The Court examined the state law and recognized that the states had a strong policy against escape clauses. The Court adopted the state law and declared void the escape type coordination of benefits provision and required that ERISA Plan to pay primary benefits.

A similar result was reached relating to contract law in *Cotten* v *General Motors Corp.*, 612 F. Supp. 948 (D.C. Mich 1985) and *Holliday* v *Xerox Corp.*, 555 F. Supp. 51 (E.D. Mich 1982), affirmed 732 F. 2d 548 (6th Cir.), *cert denied* 469 U.S. 917, 105 S. Ct. 294, 83 L.E. 2d 299 (1984). These cases stand for the proposition that contract actions are not pre-empted by ERISA. But even if state law relating to contract was pre-empted by ERISA, the contract must be construed in accordance with Federal law and since there isn't any substantial body of Federal law of contract, the state law will be looked to as a guide. In like fashion, Michigan law relating to coordination of benefits clauses is not pre-empted

by ERISA but rather is used as a guide. But in the case of the Masco Plans, and the Highland Plan, Michigan law is not only a guide but should be controlling because of the choice of law provisions incorporated in the Plans.

The Sixth Circuit recognized the irreconcilable conflict between the coordination of benefits clause but rejected the adoption of a uniform rule of deferring willy-nilly to the provisions of the ERISA Plan. Even petitioners did not contemplate such a rule. Otherwise, why insert a choice of law provision?

The Sixth Circuit also rejected a case by case development of Federal common law on the resolution of conflicted coordination of benefits provisions. After recognizing the substantial body of state law already existing on the subject, the Court concluded that any rule would merely parrot the state law anyway.

The fact is that the Sixth Circuit was confronted with such a unique issue relating to ERISA law that it did not readily lend itself to analysis under traditional pre-emption cases. The Court merely balanced the interests of the parties and the competing statutes to reach a fair and equitable rule. While the Court centered on the deemer clause and concluded that it did not bar application of Michigan Insurance Laws, the Court could have reached the same result by concluding the M.C.L.A. 500.3109a did not "relate to" the ERISA Plans within the intent and purpose of the ERISA statute. This latter approach is supported by the U.S. Supreme Court itself as noted in *Shaw* v *Delta Airlines, Inc.*, 463 U.S. 85, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983). Everything that impacts an ERISA Plan should not be considered as "related to" the Plan for purposes of ERISA pre-emption. A line has to be drawn somewhere and the drawing of the line is based on the real purpose and intent of ERISA and other competing statues and interests. Mere economic impact on a Plan is not sufficient to require pre-emption. *Rebaldo* v *Cuomo*, 749 F.2d 133 (2d Cir. 1984), *cert denied*, 472 U.S. 1008, 105 S.Ct. 2702, 86 L.Ed.2d 718 (1985). Michigan could

repeal its no-fault law and a repeal of this law would have an economic effect on the Masco Plans. Does it really make a difference that the same economic result occurs if Michigan's law regarding coordination of benefits provisions is followed?

The fact that the Sixth Circuit in this case rejected the "related to" approach which it had recognized in *Firestone Tire and Rubber, Co.* v *Neusser*, 810 F.2d 550 (6th Cir. 1987) is not really material. The Sixth Circuit balanced all the competing interest and reached the right result through a construction of the deemer clause when it could very well have balanced the same competing interest and concluded that M.C.L.A. 500.3109a did not relate to the Masco Plans and the Highland Plan within the meaning and the purpose behind ERISA pre-emption.

ERISA pre-emption flys in the face of due process standards that are invoked by compulsory automobile insurance. Pre-emption in this case would increase the cost of automobile insurance and affect the availability of insurance at fair and equitable rates. The purpose of ERISA must be balanced by this constitutional due process standard.

Petitioners claim that the Sixth Circuit opinion relating to self-insured plans has widespread ramifications. Yet it must be remembered that only 10 percent of all ERISA Plans are self-insured. Furthermore, the Sixth Circuit opinion is really related to a very narrow issue — resolution of conflicting coordination of benefits provisions. The impact of the Sixth Circuit opinion is really primarily felt in Michigan where it was intended to be felt. What other state has such a broad no-fault scheme as Michigan with the strong public policy of reducing health care costs and keeping automobile insurance premiums to a minimum?

While said in a different way from that requested by Respondents, the Sixth Circuit reached the same fair and correct result justified by the unique circumstances of this case.

II.

THE STOP-LOSS INSURANCE PURCHASED BY THE HIGHLAND PLAN IS AN INTEGRAL PART OF THE PLAN AND CONSTITUTES INSURANCE WITHIN THE MEANING OF THE DEEMER CLAUSE. THE 9TH CIRCUIT DECISIONS TO THE CONTRARY ARE SIMPLY INCORRECT.

This Court has already considered whether stop-loss insurance is insurance to the extent that the deemer clause does not bar application of state insurance laws. See *Michigan United Food and Commercial Workers Union* v *Baerwaldt*, 767 F.2d 308 (6th Cir.,1985), *cert denied* 474 U.S. 1059, 106 S.Ct. 801 88 L.Ed2d 777, (1986). *Baerwaldt* is even more significant since it dealt with a mandated benefit statute and allowed direct regulation of an ERISA Plan which had purchased stop-loss insurance. In the instant case, the Highland Plan has stop-loss insurance and application of Michigan laws relating to coordination of benefits only *indirectly* affects the Plan.

The 9th Circuit's position regarding stop-loss insurance is incorrect. *Moore* v *Provident Life and Accident Ins. Co.*, 786 F.2d 922 (9th Cir. 1986) held that the policy in question was not "insurance" within the meaning of the deemer clause since the aggregate deductible of the stop-loss insurance coverage had never been reached. In *United Food and Commercial Workers* v *Pacyga*, 801 F.2d 1157 (9th Cir. 1986) the Court held that the stop-loss insurance in question was not insurance within the meaning of the deemer clause since the insurance did not pay the participants directly but rather reimbursed the plan for amounts expended over the deductible limit.

First of all, the complete decision in *Moore* and *Pacyga* is not any longer the law in the 9th Circuit because of the standards later set by the U.S. Supreme Court in *Dedeaux* in analyzing whether or not a law is one which regulates the "business of insurance." Secondly, the 9th Circuit's position

that stop-loss insurance does not make an ERISA Plan an insured plan is simply incorrect. The essence of insurance is the transferring of a risk, the elimination of uncertainty. Insurance isn't only insurance when it pays a claim. It is the protection and security afforded by the contract in the first place that makes it insurance. Insurance is a question of status, not degree.

Insurance follows the law of large numbers. Depending on the peril involved and the number of exposures, it can accurately be predicted how many losses will be sustained in a certain period of time. However, it cannot be determined which people will sustain a particular loss. Through insurance, with everyone paying a small premium, those people who sustain a loss are indemnified. There is nothing magical about the application of this simple principle of the law of large numbers. The vast majority of people who purchase insurance never have a loss and their premiums indemnify those who do have losses. If 95 percent of insureds never have a loss, does that mean that they are not insured? If a person has a deductible, does that mean that he or she is not insured? If a person has a deductible and sustains a loss which does not exceed the deductible, does that mean that that person is not insured? Why should ERISA Plans which purchase stop-loss insurance be considered uninsured. Even if the deductibles are large, the principle is the same as for one who has a $500 deductible on his automobile collision coverage. One insures losses that one cannot afford to incur. The Highland Plan purchased stop-loss insurance to insure against losses which the Highland Plan couldn't afford to incur or was not willing to incur.

The stop-loss insurance purchased by the Highland Plan is an integral part of the Highland Plan as demonstrated by the following documents:

(a) The Preamble in the Highland Plan states the intention of Highland Appliance Company to enter into insurance contracts for specific and aggregate stop-loss protection with respect to the Plan and that this agree-

ment to get insurance, among other agreements, is incorporated together with the benefit's document and *those things together constitute the Plan*. (J.A. 546)

(b) The reinsurance policy provides benefits in accordance with the plan and the plan itself is made part of the reinsurance agreement. (J.A. 597)

(c) Highland Appliance Company's reinsurer is Northwestern National Life Insurance Company. The policy insured by Northwestern National Life Insurance Company is a "group" policy even though Highland Appliance Company is the named insured. (J.A. 611)

(d) Since Highland Appliance Company is the policy holder under the Northwestern National Life Insurance Company policy and pays all the costs, *all eligible employees must be insured*. (J.A. 613)

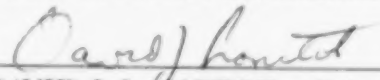
Query: Would the Highland Plan exist at all if stop-loss insurance was not available?

The insurance purchased by the Highland Plan is woven into and made a part of the Plan itself. The Highland Plan is insured within the meaning of the deemer clause and is subject to state insurance law regulation.

CONCLUSION

Based on an overall view and balancing of the competing constitutional, statutory, and individual interests and because of the choice of law provisions in both the Masco Plans and the Highland Plan, the result of the Sixth Circuit decision was correct. This Court should deny the Petition for Writ of Certiorari.

BRANDT, HANLON, BECKER, LANCTOT,
MCCUTCHEON, MARTIN & SCHOOLMASTER
Attorneys for Respondent
Auto Club Insurance Association

BY: 

DAVID J. LANCTOT P 16378
(Counsel of Record)
1700 First Federal Building
Detroit, Michigan 48226
(313) 237-5648

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